

Operationalizing Lawfare: Opportunity and Risk

A Monograph

by

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Abstract

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Lawfare is the use of law as a weapon of war, the substitute of law for military action in furtherance of a military objective. Its use is also a contentious and hotly debated issue. The United States, its allies, its competitors, and its adversaries have experimented with lawfare operations. However, the US approach and the future of lawfare are unclear. There are those who say adversaries are increasingly using lawfare and therefore the United States must develop a response. Others argue that the use of lawfare is a dangerous road that the United States should avoid.

The disagreement is over the issues of time, opportunity, and risk. The US military will likely encounter lawfare on the battlefield and thus be forced to respond. Any lawfare planning should focus not only on current opportunities but future risks. In developing the response, lawfare policy makers, planners, and lawfare advocates should anticipate obstacles and dilemmas. These obstacles will likely include developing lawfare assessment methods and integrating lawfare operations with existing capabilities. Probable longer-term dilemmas include decisions on lawfare organizational structure and the changes within the broader US government because of the use of lawfare. Recognizing these challenges ahead of time can improve lawfare actions and future outcomes. Lawfare is an important concept for military planners, but its use will involve decision dilemmas that affect not only the military but American society and policy.

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Acronyms

ADP	Army Doctrine Publication
ADRP	Army Doctrine Reference Publication
BBC	British Broadcasting Company
CIA	Central Intelligence Agency
IO	Information Operations
IRC	Information Related Capability
ISAF	International Security Force Afghanistan
JUSPAO	Joint United States Public Affairs Office
MISO	Military Information Support Operations
MV	Merchant Vessel
NIMA	US National Imagery and Mapping Agency
OEF	Operation Enduring Freedom
OSS	Office of Strategic Services
OWI	Office of Wartime Information
PSYOP	Psychological Operations
RVN	Republic of Vietnam
USIA	United States Information Agency
USIS	United States Information Service

Introduction

Human planning and decision-making processes can go awry if we do not pay enough attention to possible side effects and long-term repercussions, if we apply corrective measures too aggressively or too timidly, or if we ignore premises we should have considered.

—Dietrich Dörner, *The Logic of Failure*

The term “lawfare” refers to law as a weapon of war. It connotes the idea of the law as a military capability that has potential to shape the operational environment. Lawfare achieves the same effects as military formations and weapons, with law substituting for kinetic action. Lawfare is a reality of modern war, deployed by both states and non-state entities. Military planners accounting for the legal environment and legal effects in their operational planning will likely produce better results. This activity of accounting for legal effects has been called “legal preparation of the battlespace,” a methodology like “intelligence preparation of the battlefield”¹ to reduce uncertainty in the environment and examine how the enemy could use the environment. In modern war, law has become part of the battlefield environment, and planners should consider lawfare’s effects on military operations.

¹ Charles J. Dunlap, “Lawfare: A Decisive Element of 21st Century Conflicts?,” *Joint Forces Quarterly*, no. 54 (2009): 37, accessed August 15, 2016, <http://www.dtic.mil/dtic/tr/fulltext/u2/a515192.pdf>. Joint Publication 2-01.3, *Joint Intelligence Preparation of the Operational Environment*, Washington DC: Department of Defense, 16 June 2009, accessed March 5, 2017, <https://fas.org/irp/doddir/dod/jp2-01-3.pdf>.

The subject of lawfare is controversial.² What is missing from the debate is a premortem.³ By describing the causes of catastrophic failure of the US response to lawfare, before its actual implementation, it is possible to anticipate future problems. The goal of this process is to focus on the challenges of lawfare and by understanding those problems to be better prepared to develop an approach.

Lawfare practitioners should not be overly enamored with the operational benefits of lawfare but anticipate both the implementation problems, and the long-term strategic and political implications of acts of lawfare. A decision to counter enemy lawfare or leverage the use of law to meet military objectives will have significant risks. A lawfare approach will likely have problems of implementation. These are issues that must be addressed to engage in lawfare effectively, such as how to integrate with current military capabilities, how intelligence can collect the information needed to take lawfare action, and how to assess the effectiveness of a lawfare operation. Even more troubling for lawfare, formalizing lawfare could have far-reaching unanticipated consequences. These unanticipated consequences could affect society, the military, and US policy.

Fortunately, there is an opportunity to use history as a guide in conducting a lawfare premortem. Information operations is a useful analog to lawfare, providing a means to identify and analyze potential lawfare risks weighing against potential lawfare opportunities. Law and

² “Few concepts in public international law are more controversial than lawfare.” Charles J. Dunlap Jr., “Does Lawfare Need an Apologia?,” *Case Western Journal of International Law* 43, no. 1 (June 2010): 121, accessed 14 March 2017, <http://scholarlycommons.law.case.edu/jil/vol43/iss1/7>. See also Jamie A. Williamson, “The Knight's Code, Not His Lance,” *Case Western Reserve Journal of International Law* 43, no.1 (June 2010): 447, accessed March 14, 2017, <http://scholarlycommons.law.case.edu/jil/vol43/iss1/25>.

³ “A premortem is the hypothetical opposite of a postmortem. A postmortem in a medical setting allows health professionals and the family to learn what caused a patient’s death. Everyone benefits except, of course, the patient. A premortem in a business setting comes at the beginning of a project rather than the end, so that the project can be improved rather than autopsied. Unlike a typical critiquing session, in which project team members are asked what *might* go wrong, the premortem operates on the assumption that the “patient” has died, and so asks what *did* go wrong. The team members’ task is to generate plausible reasons for the project’s failure.” Gary Klein, “Performing A Project Premortem,” *Harvard Business Review* 85, no. 9 (2007): 18-19, accessed March 12, 2017, <https://hbr.org/2007/09/performing-a-project-premortem>.

information have significant parallels. As law becomes “lawfare” when it is leveraged against an adversary, so information becomes “military information support operations” when employed against an enemy.⁴ Based on this similarity, it is possible to take challenges in the evolutionary development of information operations to better understand challenges and risk associated with operational lawfare.

Thesis

Lawfare is a component of modern war, and there is value in a US response and development of a lawfare capability. Lawfare implementers should realize that in using the tool of lawfare, they must also mitigate the long-term potential negative outcomes and overcome significant obstacles to effective lawfare implementation.

Methodology

This monograph attempts to evaluate lawfare’s potential as a military capability. The method used to address that issue begins first with describing how lawfare could be part of a military option to accomplish an objective. Without this understanding, there is no reason to develop lawfare. Beginning with this narrow analysis, the monograph transitions to increasingly long-term risks to illustrate that lawfare presents both opportunity and risk.

Why lawfare is important is best understood using case studies to illustrate short-term benefits. Case studies illustrate the advantage of using lawfare in military planning in specific times and places. Lawfare advocates, such as Orde Kittrie, study incidents of the use of

⁴ “Psychological operations” are now called “military information support operations” (MISO). “[M]ilitary information support operations — Planned operations to convey selected information and indicators to foreign audiences to influence their emotions, motives, objective reasoning, and ultimately the behavior of foreign governments, organizations, groups, and individuals in a manner favorable to the originator’s objectives. Also called MISO.” Joint Publication 1-02, *Department of Defense Dictionary of Military and Associated Terms* (Washington, DC: Government Printing Office, 2010), 152.

lawfare.⁵ These examples demonstrate how adversaries, allies, and the United States could use lawfare in certain contexts, and why military planners should care about lawfare.

This monograph uses the history of information operations to illustrate potential long-term developments.⁶ Lawfare opponents oppose lawfare because of the dangers lawfare will present in the future. However, opponents lack a method to analyze future adverse effects. Lawfare will likely have many of the same long-term risks associated with the development of information operations capability. Critical stages in the development of information operations highlight long-term risks of lawfare.

Argument

It is important to first understand the term “lawfare,” as well as what has been written on the topic before analyzing the costs and benefits of lawfare. The best illustration of lawfare is an example from Operation Enduring Freedom in which the Department of Defense attempted to deny enemy access to commercial imagery using a legal tool. Lawfare is an emerging term. Because of this, it is important to understand the current debate over lawfare. The debate should be understood as divided into two camps. The first emphasizes the benefits and are advocates. The second camp is critical of lawfare. Lawfare advocates see current

⁵ These include “The Palestinian Authority’s Lawfare Against Israel” and “The U.S. Government’s Financial Lawfare Against Iran.” Orde F. Kittrie, “The Palestinian Authority’s Lawfare Against Israel,” in *Lawfare: Law As A Weapon Of War* (United Kingdom: Oxford University Press, 2016), 197. Orde F. Kittrie, “The U.S. Government’s Financial Lawfare Against Iran,” in *Lawfare: Law As A Weapon Of War* (United Kingdom: Oxford University Press, 2016), 111.

⁶ “Information Operations” is the term used today to describe the integrated employment of information capabilities (electronic warfare, military deception, operations security, and military information support operations) to achieve effects (influence, disrupt, corrupt, or usurp adversary decision making). Christopher Paul and Charles A Krohn, *Information Operations - Doctrine and Practice: A Reference Handbook* (Westport, CT: Praeger Security International, 2008), 2. “As the strategic environment continues to change, so does information operations (IO). Based on these changes, the Secretary of Defense now characterizes IO as the integrated employment, during military operations, of IRCs (Information Related Capabilities) in concert with other lines of operation to influence, disrupt, corrupt, or usurp the decision making of adversaries and potential adversaries while protecting our own.” *Joint Publication (JP) 3-13 Information Operations* (Washington, DC: Government Printing Office, 2014).

opportunities while opponents look further into the future and focus on potential corrosive effects of lawfare.

The time component permits analysis of the costs and benefits of lawfare. Benefits are best illustrated by looking at a scenario or set of facts and identifying where and how lawfare could help to achieve an operational objective. In contrast, the risks likely develop over time in unexpected ways. Lawfare risks become apparent when lawfare is compared with the history of information operations. Risks from lawfare that are identified through the history of information operations can be mitigated. Potential lawfare planners and policy makers should identify actions that can be taken in an operational context with minimal anticipated effects outside the operation's time and space. Factors from information operations should be problem indicators for future lawfare implementers. If we better understand lawfare detractors' and advocates' line of argument and their argument's implications, we will better understand lawfare.

Lawfare Example

When state and non-state actors leverage law against an enemy, it becomes lawfare. Lawfare can be a factor to achieve an objective or desired state. Lawfare is, therefore, important to the operational planner because it can be part of a combination of means to accomplish an objective or move towards a desired future state. The US Department of Defense experimented with lawfare early in Operation Enduring Freedom (OEF) and found that lawfare, with certain limitations, was useful in achieving unified government action.

Within weeks of September 11, 2001, the United States inserted members of the Central Intelligence Agency's Special Activity Division into Afghanistan and began working with the Northern Alliance.⁷ Upon entry of units from 5th Special Forces Group, the United States and the

⁷ J. Daniel Moore, "First In: An Insider's Account of How the CIA Spearheaded the War on Terror in Afghanistan — Central Intelligence Agency," June 26, 2008, accessed October 30 2016,

United Kingdom commenced OEF on 7 October 2001.⁸ While the United States began to plan more troop movements into the country, and the United Nations began the initial stages of creating International Security Forces Afghanistan (ISAF), the US National Imagery and Mapping Agency (NIMA) was working on behalf of the Pentagon on another effort.⁹

In early October 2001, NIMA purchased exclusive rights to satellite images produced by Ikonos, a commercially available satellite sensor owned and operated by Space Imaging. Space Imaging marketed the high-resolution images produced by Ikonos, including the area involved in Operation Enduring Freedom.¹⁰ The price tag for the exclusivity was reportedly 1.9 million dollars a month.¹¹ The British Broadcasting Corporation (BBC) reported on 17 October 2001 that NIMA executed a contract providing for exclusivity that stated that Space Imaging shall not "sell, distribute, share or provide the imagery to any other entity."¹²

Other options than lawfare were available to the United States, but were rejected due to the competing interests at play in the situation. News reports describe how, "under American law, the US Defense Department has legal powers to exercise shutter control over civilian satellites

https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/vol49no4/War_on_Terror_9.htm.

⁸ CNN, "Operation Enduring Freedom Fast Facts," CNN Library, October 5, 2016, accessed April 14 2017, <http://www.cnn.com/2013/10/28/world/operation-enduring-freedom-fast-facts/index.html>.

⁹ The National Imagery and Mapping Agency was a government agency under the Department of Defense created in the National Defense Authorization Act for Fiscal Year 1997 "to provide a single agency focus for the growing number and diverse types of customers for imagery and geospatial information resources within the Government." National Defense Authorization Act for Fiscal Year 1997, Public Law 104-201, 104th Cong., 2d Sess. (September 23, 1996), §1102. accessed 8 December 2016, <https://www.gpo.gov/fdsys/pkg/PLAW-104publ201/pdf/PLAW-104publ201.pdf>, accessed 8 December 2016.

¹⁰ USA TODAY, "Military Snaps Up Satellite Pictures of War Zone, October 15, 2001, accessed December 15, 2016, usatoday30.usatoday.com/tech/news/2001/10/15/attack-satellite.htm#more.

¹¹ "Eye Spy," *The Economist*, last modified November 8, 2001, accessed April 14, 2017, <http://www.economist.com/node/852498>.

¹² BBC, "US Buys Afghan Image Rights," *BBC Sci/Tech* (BBC News), October 17, 2001, accessed December 15, 2016, available at <http://news.bbc.co.uk/2/hi/science/nature/1604426.stm>.

launched from the US to prevent enemies using the images while America is at war.”¹³ Instead, however, of exercising shutter control, a governmental agency obtained exclusive rights to the produced imagery and prevented their release. As the BBC notes, the US military did not need the images themselves, but rather was interested in preventing others from obtaining and using them. The contract option was considered among others available to the Department of Defense. Shutter control was not pursued in part due to possible court challenges involving freedom of speech, as well the US government’s interest in not revealing its shutter control capability.¹⁴

The US contract with Ikonos and Space Imaging is an example of lawfare. By executing a contract (a legal tool), the United States intended to secure a military advantage in information superiority. United States forces could act against the Taliban with a position of relative advantage with respect to access to high-resolution satellite imagery.¹⁵ Those forces therefore possessed superior situational awareness compared to the adversary.¹⁶

¹³ “Shutter control” is a policy of unilateral action whereby the US can limit data collection and/or distribution. “During periods when national security or international obligations and/or foreign policies may be compromised, as defined by the secretary of defense or the secretary of state, respectively, the secretary of commerce may, after consultation with the appropriate agency(ies), require the licensee to limit data collection and/or distribution by the system to the extent necessitated by the given situation.” Ann M. Florini and Yahya Dehqanzada, “Commercial Satellite Imagery Comes of Age,” *Issues In Science and Technology* 16, no. 1 (1999), 45-52, accessed December 6, 2016, 45-52, <http://issues.org/16-1/florini/>; BBC, “US Buys Afghan Image Rights,” *BBC Sci/Tech* (BBC News), October 17, 2001, <http://news.bbc.co.uk/2/hi/science/nature/1604426.stm>. Ikonos was a candidate for shutter control as it was launched on 24 September 1999 from Vandenberg Air Force Base, California. “Ikonos Satellite Sensor,” accessed 15 February 2017, <http://www.satimagingcorp.com>.

¹⁴ “Eye Spy,” *The Economist*, last modified November 8, 2001, accessed November 7 2016, <http://www.economist.com/node/852498>.

¹⁵ “A position of relative advantage is a location or the establishment of a favorable condition within the area of operations that provides the commander with temporary freedom of action to enhance combat power over an enemy or influence the enemy to accept risk and move to a position of disadvantage.” Army Doctrine Reference Publication (ADRP) 3-0, *Operations* (Washington, DC: Government Printing Office, 2016), 4-7.

¹⁶ NIMA would later decline to renew the contract and the director opine that “it is unlikely that we would do that again” indicating either that benefits were minimal or costs were prohibitive. Robert A. Weber and Kevin M. O’Connell, *Alternative Futures: United States Commercial Satellite Imagery in 2020* (Washington, DC: Innovative Analytics and Training, 2011), 24, accessed 31 October 2016, http://www.innovative-analytics.com/wp-content/uploads/2012/01/IAT_DoC_AlternativeFutures_Commercial_Satellite_Imagery-Final-Release.pdf.

Though no silver bullet, NIMA's acquisition of rights to Ikonos imagery is a useful example of lawfare. Through an available legal tool, the United States government obtained an effect for its military forces. That effect could have been obtained using other military or technological means, such as shutter control. Lawfare allowed a combination of legal, economic and military means to resolve a nuanced situation.¹⁷ Law, then, though not a supreme weapon, is an operational planning tool with effects to be considered, able to change the environment and constrain an adversary.

Lawfare: Origin and Definition

There is disagreement over the definition of "lawfare." This monograph uses Charles Dunlap's definition and Orde Kittrie's criteria for lawfare. These definitions are more limited in scope and are concrete, compared to the definitions offered by lawfare detractors, which tend to be more expansive.

Dunlap's definition of "lawfare," the most common, is "the strategy of using – or misusing – law as a substitute for traditional military means to achieve a warfighting objective."¹⁸ Lawfare is the use of law and judicial processes as an instrument of warfare.¹⁹ The definition is purposely value neutral, in keeping with the conception of law as a weapon of war. Lawfare in the proposed definition is an available tool that could be used by either side in a conflict.

This monograph adopts Kittrie's lawfare criteria. Kittrie proposes that to qualify as lawfare; an action must meet two conditions:

¹⁷ The image exclusivity was gained by a legal tool, obtained financially, for military forces operating in Afghanistan.

¹⁸ Charles J. Dunlap, "Lawfare: A Decisive Element of 21st Century Conflicts?," *Joint Force Quarterly*, no. 54 (2009): 35, accessed August 15, 2016, <http://www.dtic.mil/dtic/tr/fulltext/u2/a515192.pdf>.

¹⁹ Harriette Hill, *Lawfare and the International Criminal Court: Questions & Answers* (n.p.: United Nations Association of the United States of America, 2008), accessed April 14, 2017, <http://www.amicc.org/docs/Lawfare.pdf>.

1. The actor uses law to create the same or similar effects as those traditionally sought from conventional kinetic military action – including impacting the key armed force decision making capabilities of the target;
2. and one of the actor’s motivations is to weaken or destroy an adversary against which the lawfare is being deployed.²⁰

Thus, lawfare is a product of the actor’s intention coupled with the effects produced by the employment. To have a lawfare operation, an actor must want to weaken an adversary, and the actor must use law to achieve the desired effects. These effects must be comparable to those that could be achieved using an alternative conventional military action.

This monograph adopts Kittrie’s two types of lawfare. The types of lawfare are:

“(1) ‘instrumental lawfare’ – the instrumental use of legal tools to achieve the same or similar effects as those traditionally sought from conventional kinetic military action; and (2) ‘compliance-leverage disparity lawfare’ – lawfare, typically on the kinetic battlefield, which is designed to gain advantage from the greater influence that law, typically the law of armed conflict, and its processes exerts over an adversary”²¹

In instrumental lawfare, both the actor and target are subject to the law that is leveraged. The circumstances of employment allow for an effect on the adversary that is desirable for the actor. The previously described US actions acquiring IKONOS imagery are an example of instrumental lawfare.

In compliance-leverage disparity lawfare, the actor seeks an advantage because the unequal influence of law on actor and adversary. In compliance-leverage disparity lawfare, an actor less influenced by law leverages law against an adversary highly influenced by law. Compliance-leverage disparity lawfare is important in assessing vulnerabilities of the United States because law and legal concepts greatly influence the United States. Democratic and legally based societies will likely be the targets of state and non-state entities using compliance-leverage disparity lawfare.

²⁰ Kittrie, *Lawfare: Law as a Weapon of War*, 8.

²¹ Kittrie, *Lawfare: Law as a Weapon of War*, 11.

Literature Review – Short-Term Benefits and Long-Term Risks

Lawfare has been a divisive topic among legal academics. The best way to understand the debate is to separate those who advocate for US involvement in lawfare from those who caution against lawfare. Those who advocate for lawfare think in terms of operations, focusing on a more narrowly defined space and time than those who warn of the dangers of lawfare.²² With this understanding the arguments of both detractors and advocates can be combined to visualize future lawfare dilemmas. The challenge for lawfare development is how to realize the short-term benefits while mitigating future problems.

Lawfare Theorist Camp 1. Opportunity–Short-Term Benefits

Lawfare advocates focus on short-term benefits of lawfare. For these writers, the potential power of lawfare to achieve national and military objectives demonstrate lawfare's value. Advocates demonstrate this effectiveness by showing how lawfare played a role in a specific context or scenario. Lawfare advocates focus on a narrower space and time than lawfare opponents.

Charles Dunlap is considered the father of lawfare as a weapon of war. His scholarship has suggested that lawfare is “a decisive feature of 21st century conflicts.”²³ Dunlap linked lawfare to the military, explaining to non-legal military professionals how accounting for the law is practical in military operations. By conceiving of lawfare in a narrower operational time and space than his opponents, Dunlap primarily sees the benefits of lawfare. Dunlap states that his “purpose of the lawfare conceptualization in the national security context is to provide a vehicle that resonates

²² An “operation” inherently has a defined time and space component as an operation is “a sequence of tactical actions with a common purpose or unifying theme. (JP 1).” Army Doctrine Reference Publication (ADRP) 3-0, *Operations* (Washington, DC: Government Printing Office, 2016), Glossary-6.

²³ Charles J. Dunlap, “Lawfare: A Decisive Element of 21st Century Conflicts?,” *Joint Force Quarterly*, no. 54 (2009), 34, accessed August 15, 2016, <http://www.dtic.mil/dtic/tr/fulltext/u2/a515192.pdf>.

readily with non-lawyer audiences, particularly in the armed forces.”²⁴ Dunlap has focused most of his lawfare research on noting the benefits of lawfare,²⁵ and points out that legal effects can complement other military actions.²⁶

Orde Kittrie focuses on the aid lawfare could provide to achieve national objectives, and thus envisions operational and strategic opportunities rather than long-term risks. Orde Kittrie wrote the first English language book on lawfare, published in 2016. In *Lawfare: Law as a Weapon of War*, Kittrie argues that the United States lacks a coherent national system for employing lawfare, but that it should develop a system.²⁷ He argues that the United States should use law more effectively to achieve strategic objectives. “All the United States government has to do is develop and implement a strategy for waging and defending against lawfare in a more sophisticated, systematic, and coordinated manner.”²⁸ Kittrie focuses on the benefits that lawfare could provide in achieving national objectives, and his book is a call to action to deal with lawfare systematically.

Joel Trachtman introduces the idea of coordinating military and lawfare activity within the government. In August of 2016 Trachtman wrote “Integrating Lawfare and Warfare,” a law review article that envisioned what he called a lawfare “command,” saying that he wondered “how much

²⁴ Charles J. Dunlap, “Introduction to the Concept of Lawfare.” In *National Security Law*, edited by John N. Moore and Robert F. Turner, 829 (Durham: Carolina Academic Press, 2005), accessed August 15, 2016, http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6100&context=faculty_scholarship, 829.

²⁵ “For example, using legal means to ‘attack the funding of terrorist groups’ is a core strategy to combat this unconventional threat. What is more is that the parallel application of legal weaponry coincident with more traditional arms can have an exceptionally productive synergistic effect.” Charles J. Dunlap, “Does Lawfare Need an Apologia?,” *Case Western Reserve Journal of International Law* 43, no. 1 (June 2010): 124, accessed August 15, 2016, <http://scholarlycommons.law.case.edu/jil/vol43/iss1/7/>.

²⁶ “Legal ‘weaponry,’ for instance, may well be the most effective means of attacking the financial networks terrorist organizations require to function. Likewise, sanctions and other legal methodologies can isolate insurgencies from the external support many experts believe is essential to victory.” Charles J. Dunlap, “Lawfare: A Decisive Element of 21st Century Conflicts?,” *Joint Force Quarterly*, no. 54 (2009): 35, accessed August 15, 2016, <http://www.dtic.mil/dtic/tr/fulltext/u2/a515192.pdf>.

²⁷ Kittrie, *Lawfare: Law as a Weapon of War*, 343.

²⁸ *Ibid.*

more extensive the integration of a lawfare command with kinetic commands might be.”²⁹ The author proposed eight areas “in which an integrated legal component may improve strategic and tactical outcomes,”³⁰ furthering his argument that “lawfare can be strategically integrated into military command structures to bring about desired outcomes.”³¹

These lawfare writers all focus on lawfare’s benefits. They argue that lawfare can help to achieve desired outcomes and can substitute for traditional military means. An opposing camp, however, focuses not on utility but broader implications of lawfare. This second camp questions where embracing the lawfare concept might take the US.

Lawfare Theorist Camp 2. Risk–Longer-Term Pitfalls

Lawfare opponents focus on negative or potentially negative aspects of lawfare. This group of writers takes a longer-term view of lawfare. These writers do not deny that there may be benefits in a narrow context but argue that lawfare will undermine respect for the law, creating legal cynicism. They conclude that this cynicism would have disastrous effects on US politics and society, perhaps even undermining the observance of the law itself. These undesirable side-effects thus either make lawfare dangerous or completely untenable. Lawfare opponents consider broader effects of lawfare across time and space compared to lawfare advocates.

For the Lawfare Project, a non-profit legal think-tank calling itself “the legal arm of the Pro-Israel Community,” lawfare undermines justice and is therefore negative. The Lawfare Project is thus troubled by what it sees as long-term effects of the abuse of the legal process and use a

²⁹ Joel P. Trachtman, “Integrating Lawfare and Warfare,” *Boston College International and Comparative Law Review* 39, no. 2 (2016): 281, accessed September 8, 2016, <http://lawdigitalcommons.bc.edu/iclr/vol39/iss2/3>.

³⁰ Ibid.

³¹ Ibid., 267

lawfare conception different from Dunlap's.³² On its website, the Lawfare Project asserts that lawfare is

the abuse of Western laws and judicial systems to achieve strategic military or political ends” and that “lawfare is inherently negative. It is not a good thing. It is the opposite of pursuing justice. It is filing frivolous lawsuits and misusing legal processes to intimidate and frustrate opponents in the theater of war. Lawfare is the new legal battlefield.”³³

The Lawfare Project is concerned with “the abuse of law as a weapon of war against western democracies” and “the perversion and misapplication of international and national human rights law against the United States and other democracies.”³⁴

The blog *Lawfare: Hard National Security Choices* has a longer-term view than lawfare proponents, and is interested in the implications of lawfare for US national security. The blog takes a wider view of lawfare than lawfare proponents calling lawfare “that nebulous zone in which actions taken or contemplated to protect the nation interact with the nation’s laws and legal institutions.”³⁵ The authors of *Lawfare: Hard National Security Choices* on their website set out their purpose saying

the name Lawfare refers both to the use of law as a weapon of conflict and, perhaps more importantly, to the depressing reality that America remains at war with itself over the law governing its warfare with others. This latter sense of the word—which is admittedly not its normal usage—binds together a great deal of our work over the years. It is our hope to provide an ongoing commentary on America’s lawfare, even as we participate in many of its skirmishes.³⁶

³² The Lawfare Project “is a nonprofit legal think tank based in New York City, that mobilizes public officials, media, jurists and legal experts to counter the international lawfare phenomenon: the abuse of the law as a weapon of war against Western democracy.” “Protecting Against the Politicization of Human Rights,” *The Lawfare Project*, last modified 2016, accessed September 27, 2016, <http://thelawfareproject.org/>.

³³ Ibid.

³⁴ Ibid.

³⁵ “Lawfare: Hard National Security Choices,” *The Lawfare Institute*, last modified September 23, 2016, accessed September 27, 2016, <https://www.lawfareblog.com/>.

³⁶ “Lawfare: Hard National Security Choices,” *The Lawfare Institute*, last modified September 23, 2016, accessed September 27, 2016, <https://lawfareblog.com/about-lawfare-brief-history-term-and-site>.

Scott Horton also looks at long-term problems of lawfare. In 2010, Scott Horton wrote a law review article entitled, “The Dangers of Lawfare.” The author believes that labeling a state action or legal effort “lawfare” is an attempt to delegitimize the action. Horton worries that lawfare undermines legitimate legal claims and avoids discussion of their underlying merits. Horton believes that labelling a state action as lawfare is an attempt to delegitimize the action rather than have a debate over the legality and merits of the dispute. Based on lawfare shifting from a debate over the merits of a claim to debate about legitimacy, lawfare is wrong and dangerous. Horton closes the article observing that “this is the ultimate danger of lawfare. It is a dangerous domestic political game that promotes an attitude of contempt towards important earnest obligations. That attitude will never serve a democracy in the long run.”³⁷

Law professor Michael Newton asserts that illegitimate lawfare will ultimately create greater uncertainty about the application of rules and will erode the customs and laws of war.³⁸ In describing his view of illegitimate lawfare, Newton is looking at the potential long-term consequences of a lawfare program. Illegitimate lawfare over time would breed cynicism, and ultimately weaken the restraint of law on power.

Legal movements that foreseeably serve to discredit the law of armed conflict even further in the eyes of a cynical world actually undermine its utility. Lawfare that creates uncertainty over the application of previously clear rules must be opposed vigorously because it does perhaps irrevocable harm to the fabric of the laws and customs of war.³⁹

Operational Lawfare Opportunities

³⁷ Scott Horton, “The Dangers of Lawfare” *Case Western Reserve Journal of International Law* 43, no. 1 (June 2010): 179, accessed April 14, 2017, <http://heinonline.org/HOL/LandingPage?handle=hein.journals/cwrint43&div=14&id=&page=>.

³⁸ Newton believes that there is legitimate and illegitimate lawfare. Illegitimate lawfare is “lawfare that erodes the good faith application of the laws and customs of warfare,” meaning that it is illegitimate based on the resulting erosion. Presumably lawfare that does *not* distort or portray legal structure “as a mass of indeterminate subjectivity” would be legitimate. Michael A. Newton, “Illustrating illegitimate Lawfare,” *Case Western Reserve Journal of International Law* 43, no. 1 (June 2010): 255, accessed August 15, 2016, <http://scholarlycommons.law.case.edu/jil/vol43/iss1/16>.

³⁹ Newton, “Illustrating illegitimate Lawfare,” 255.

The lawfare debate is a disagreement over lawfare based on how far into the future one looks from a use of lawfare. The resolution to this time problem is to begin close in time and space to an issue, and consider consequences gradually moving further out in time and space. It is important to examine what could go wrong along the way to avoid over optimism. Before proceeding to what would cause lawfare to fail, we must first understand why the United States and the US military should be concerned with lawfare at all.

Lawfare as a concept is important to military planners because, in modern military operations, either side can leverage law. An adversary should be expected to identify vulnerabilities in any US coalition position and act to exploit those vulnerabilities. Due to the high respect for law in the US, it is likely that any adversary less influenced by law will leverage the disparity. Thus, the US military should understand how the enemy is likely to use lawfare, and how the US can appropriately respond.

The operational value of lawfare cannot be understood without understanding policy factors that could influence lawfare operational use. The United States could also benefit in a military context by identifying where it can engage in lawfare. Lawfare will likely be an attractive option for policymakers because it allows government action without the immediate risk of life. Additionally, lawfare appears to present an option without the monetary or political costs of troops and equipment. When narrowly focused in time and space, lawfare is a very attractive option to policymakers as it appears to have a lower cost than traditional military means.

The increasing intersection of war and law makes it likely that operational planners will encounter lawfare in the future, either waged against the United States by adversaries or leveraged by the United States due to political pressures to limit cost while maximizing options. It is in this sense that lawfare represents opportunity. Military planners should understand how lawfare could work for or against their military operations. They should also understand the policy factors that make lawfare an attractive option.

Opportunity Category 1. Counter-Lawfare Operations–Compliance-Leverage Disparity

One possible use of lawfare is to focus on the disparity in law between adversary nations or organizations. US actions to counter enemy efforts would be defensive in nature. This defensive approach would increase the US military's ability to counter or respond to lawfare operations by adversaries. Engaging in "defensive lawfare" is itself a form of lawfare-based mitigation of vulnerabilities. However, effectively defending against lawfare will require more than a legal effort. Desiring to counter enemy lawfare efforts effectively will require systematic changes to military force structure. Effectively conducting lawfare would require integration of the intelligence and protection warfighting functions with lawfare, and require changes in those functions.

Adversaries and competitors have used lawfare against the United States.⁴⁰ Military planners should anticipate the use of lawfare by adversaries. Increased awareness of lawfare effects and understanding of how adversaries use and integrate lawfare will allow military forces to anticipate and mitigate lawfare threats. Counter-lawfare operations and legal preparation of the battlespace can help to anticipate enemy lawfare efforts.

A way to anticipate and defend against enemy lawfare can be demonstrated by first looking at how compliance-leverage disparity lawfare could be employed against the US. A former prosecutor for the US Military Commissions at Guantanamo Bay, Michael Lebowitz, describes how the al-Qaeda cell executed a concerted lawfare effort combined with other tactics, such as armed resistance and acts of terrorism. After the torture of detainees at Abu Ghraib Iraq became public, al-Qaeda and its affiliates noted the US response at military prison facilities and the wider ripple effects of the abuse throughout the US military. With good reason, the US investigated and

⁴⁰ Examples include the Taliban and Al Qaeda. "The Taliban and al Qaeda are attempting to demonize the air weapon through the manipulation of the unintended civilian casualties airstrikes can produce." Charles J. Dunlap, "Lawfare: A Decisive Element of 21st Century Conflicts?," *Joint Force Quarterly*, no. 54 (2009): 36, accessed August 15, 2016, <http://www.dtic.mil/dtic/tr/fulltext/u2/a515192.pdf>. Kittrie cites the People's Republic of China as a user of compliance-leverage disparity lawfare. Orde Kittrie, *Lawfare: Law As A Weapon Of War* (United Kingdom: Oxford University Press, 2016), 174.

corrected systems and punished individuals that facilitated torture. With assurance that claims of torture would be investigated, captured al-Qaeda operatives would routinely claim torture as a method of disrupting Coalition efforts. Michael Lebowitz describes this as “tactical lawfare,” as time and resources were spent investigating detainee’s claims rather than conducting operations against al-Qaeda. The lawfare effect was to shift the contest from the battlefield into court rooms in Guantanamo Bay.

In the case of the war against al-Qaeda, a calculated legal effort has accomplished similar tactical objectives without the need to conduct major offensive operations. By following what was tantamount to scripted legal advice, detainees and their advocates in the aftermath of the 9/11 attacks launched a massive campaign through various court systems worldwide. The common theme of these legal attacks was —torture.⁴¹

This opportunity for al-Qaeda was made possible through compliance-leverage disparity lawfare.

US military planners should anticipate in future conflicts action by adversaries designed to gain advantage from the greater influence that law has within the US and the legal processes that influence the US military. Conducting “legal preparation of the battlespace” or counter-lawfare operations are ways to prepare for compliance-leverage disparity lawfare. The ability to anticipate opposing forces using compliance leverage-disparity lawfare against US operations represents an opportunity.

“Legal preparation of the battlespace” could result in protection measures like Michael Lebowitz’ recommendations to counter al-Qaeda’s lawfare initiative. Lebowitz’ recommendations were: to develop a single standardized documentation form attached to the detainee; institute

⁴¹ Michael J. Lebowitz, "The Value Of Claiming Torture: An Analysis Of Al-Qaeda's Tactical Lawfare," *Case Western Reserve Journal of International Law* 43, no. 1 (June 2010): 356-392, accessed August 15, 2016, <http://scholarlycommons.law.case.edu/jil/vol43/iss1/22>.

standard training to document detainee treatment; and include military prosecutors in responses to the media.⁴² These actions allow the United States to better respond to a lawfare claim against the US military. Military planners could examine future courses of action to identify tasks that could be performed to prevent or mitigate an enemy lawfare operation. A US counter-lawfare operation would attempt to anticipate enemy lawfare actions by performing legal preparation of the battlespace, enabling lawfare protection measures integrated into operational plans.

Lebowitz' understanding of the operational and legal environment allowed him to propose a solution to a problem he identified. Integrating the legal environment into operational planning could be one way to formalize legal preparation of the battlefield. Planning teams could ensure that the legal environment is accounted for in operational planning. Beginning with understanding and visualizing the legal environment, the environment can be better described.⁴³ The solutions that can be developed to defend against enemy compliance-leverage disparity lawfare could be specific to the operation, just as Lebowitz' recommendations were specific to the detainee issues Lebowitz confronted in 2004.

Opportunity Category 2. Offensive Lawfare Operations—Instrumental lawfare

Describing the legal environment, anticipating enemy action, and defending against enemy lawfare efforts are not the only actions available to the US military. The US can also take advantage of the interconnected pervasive features of law to limit or influence an adversary in furthering a limited purpose. This is instrumental lawfare: “the instrumental use of legal tools to achieve the same or similar effects as those traditionally sought from conventional kinetic military action.”⁴⁴

⁴² Ibid., 388-391.

⁴³ The staff assists the commander throughout the operations process to “understand, visualize, describe, direct, lead, assess.” Army Doctrine Publication (ADP) 5-0, *The Operations Process* (Washington, DC: Government Printing Office, 2012), 2-4.

⁴⁴ Kittrie, *Lawfare: Law as a Weapon of War*, 11.

Sanctions and international law create an environment just as populations and physical terrain are components of an operational environment.⁴⁵ Terrain, populations and law can be leveraged to varying degrees to achieve a goal. An enemy should be expected to act to mitigate their vulnerabilities, but lawfare is an option to be used alongside other traditional means of compulsion. Most effectively, lawfare can result in time to engage in other diplomatic or military efforts. It can be an effective stalling operation for other options. Finally, it is an economy of force operation, minimizing combat power applied to secondary efforts allowing maximum combat power on primary efforts.⁴⁶

To illustrate how instrumental lawfare can operate it is relevant to consider the case of the Merchant Vessel (MV) *Alaed*. In 2012, Russia was becoming involved in Syria as it increased support for the Al-Assad government, which was engaged in a civil war that continues to the date of this writing.⁴⁷ As relayed in Kittrie's book,

a Russian ship, the MV *Alaed*, was at sea in June 2012 carrying helicopter gunships bound for Syria's Assad regime. The U.K. wished to stop the shipment but understood that forcibly intercepting a Russian ship could have risked World War III. So, the U.K. persuaded the ship's insurer, London's Standard Club, to withdraw the ship's insurance. As a result, the ship and its deadly cargo turned around and returned to Russia.⁴⁸

⁴⁵ "An operational environment is a composite of the conditions, circumstances, and influences that affect the employment of capabilities and bear on the decisions of the commander (JP 3-0)." Army Doctrine Publication (ADP) 5-0, *The Operations Process* (Washington, DC: Government Printing Office, 2012), 2.

⁴⁶ Economy of force is one of the nine principles of war. "Economy of force is the judicious employment and distribution of forces. It is the measured allocation of available combat power to such tasks as limited attacks, defense, delays, deception, or even retrograde operations to achieve mass elsewhere at the decisive point and time." See Joint Publication (JP) 3-0, *Joint Operations* (Washington DC: Department of Defense, 2017), A-2, accessed March 5, 2017, http://www.dtic.mil/doctrine/new_pubs/jp3_0.pdf.

⁴⁷ Richard Spencer, "Britain Stops Russian Ship Carrying Attack Helicopters for Syria," *The Telegraph* (Telegraph.co.uk), June 19, 2012, accessed April 14, 2017, <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/9339933/Britain-stops-Russian-ship-carrying-attack-helicopters-for-Syria.html>.

⁴⁸ Kittrie, *Lawfare: Law as a Weapon of War*, 2.

European Union sanctions announced in 2011 set the environment to enable UK action. Sanctions by the European Union against Syria banned not only the exportation of arms, but also services such as insurance. For the UK, given the reality of these sanctions, the question then became how to best enforce them. The purpose was clear, a desire to deny Syria and Russia attack helicopter capability in the Syrian operational area. Given the existence of sanctions, the question was one of means.

One option that was considered was a raid.⁴⁹ Certainly, if British Special Forces had descended onto the MV *Alaed* in the Mediterranean Sea, there would have been no question that would have constituted a military operation. Both the purpose and means would have been war-like in nature. Such action would have involved significant risk not only to the personnel executing the mission, but would have involved increased risk to the one authorizing the mission. International humanitarian law could have been implicated based on the civilian status of the crew and disproportionate force concerns.⁵⁰

The involvement of a third party further complicated the situation, as the MV *Alaed* was Curacao flagged and owned.⁵¹ On 21 June 2012, during a Russian foreign affairs briefing, officials reportedly “said that Russian freighter *Alaed* is sailing to Murmansk port, Barents sea, to change

⁴⁹ Robert Winnett, “Syria: David Cameron Considered Ordering Special Forces to Seize Russian Ship,” *The Telegraph* (Telegraph.co.uk), June 20, 2012, accessed April 14, 2017, <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/9345368/Syria-David-Cameron-considered-ordering-special-forces-to-seize-Russian-ship.html>.

⁵⁰ The difficult disproportionate force calculation was avoided by using lawfare. As international lawyer Oscar Schalter remarks, “determining the proper relation between means and ends in situations of great complexity and uncertainty is never easy. Decision makers are faced with their own inadequacies and lack of knowledge, together with the pressures inherent in conflict. They cannot forget the risks and costs of restraint, yet they must also be mindful of the legal imperative to avoid unnecessary and disproportionate force.” Oscar Schalter quoted in Ian Henderson, *The Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I* (Netherlands: Brill Academic Publishers, 2009), 157.

⁵¹ Maritime Bulletin, “M/V *Alaed* Incident, Full Report,” last modified June 24, 2012, accessed March 14, 2017, <http://www.odin.tc/news/read.asp?articleID=1002>.

the flag from Curacao to Russian, having on board helicopters and spare parts for air-defence system, all of them destined for Syria.”⁵²

After the shipping insurance was withdrawn, Russia did not meekly withdraw from its course of action but continued to pursue its objective. The MV *Alaed* was not Russia’s final attempt to introduce the attack helicopters. The United States and Iraq engaged in diplomatic talks in December 2012 to prevent the use of Iraq airspace for military aid to Syria, indicating that the insurance effort was not a final resolution to the attack helicopter situation.⁵³ The lawfare option in the case of the MV *Alaed* was but one facet among diplomatic, military, and economic actions.

Practical Advantages to Lawfare

This example illustrates three points to understand the potential that lawfare operations and “legal preparation of the battlespace” have within the practice of operational planning. The fact that the UK considered other means, including kinetic military activity, and that the revocation of insurance had effects related to a military objective shows how a legal action can replace what would normally require soldiers, vehicles, and ammunition. The first benefit for lawfare is that it can accomplish the objectives of combat without the cost. Lawfare advocates largely focus on the attractiveness of this aspect of lawfare.

A related second potential is that lawfare can bypass issues that arise in the application of traditional military firepower. Rather than weighing the law of proportionality and assessing military risk in applying lethal force, engaging in lawfare can temporarily restrain an opponent. In the case of the MV *Alaed*, the crew was civilian. The former general counsel of the Department of Defense has said that in lethal targeting for military objectives, “we must refrain from an attack that

⁵² Maritime Bulletin, “M/V *Alaed* Incident, Full Report,” last modified June 24, 2012, accessed March 14, 2017, <http://www.odin.tc/news/read.asp?articleID=1002>.

⁵³ Michael Grabell, Jeff Larson, and Dafna Linzer, “Iraq Blocks Syria’s Request to Fetch Combat Helicopters from Russia,” *ProPublica*, last modified December 5, 2012, accessed November 4, 2016, <https://www.propublica.org/article/iraq-blocks-syrias-request-to-fetch-combat-helicopters-from-russia>.

is expected to cause incidental harm to civilians or civilian objects that would be excessive in relation to the anticipated concrete and direct military advantage.”⁵⁴ Lawfare provided a non-lethal way to achieve similar results to the special forces raid, thus avoiding difficult collateral damage questions of lethal force.

The third potential of lawfare is that it can create time for other government efforts outside of the military. Lawfare efforts against the MV Alaed resulted in additional time to continue diplomacy to achieve the higher purpose of denying military aid to Syria. The revocation of the shipping insurance was not the end of efforts to bring attack helicopters into Syria. However, from the UK point of view, the lawfare operation succeeded temporarily in that it allowed for other diplomatic and economic action. The diplomatic efforts were only possible because of the lawfare operation. Describing events after the MV Alaed incident, ProPublica quotes a US diplomatic official involved in the diplomatic effort to convince Iraq to deny the use of airspace to Russia transport of helicopters. “We have urged them directly to insist that the inspection of those flights occur or deny overflight rights, we have raised this concern and they have taken a couple steps in the right direction — either denying overflight rights if they believe arms are being shipped to Syria or insisting on an inspection.”⁵⁵ This diplomatic effort would not have been possible without the lawfare effort against the MV Alaed.

In addition to clearly constituting a military action, the alternative special forces raid would have been in pursuit of a clear military objective (namely, the denial of attack rotary wing assets into the Syrian theater). Indeed, there are military operational terms associated with the

⁵⁴ Jennifer O’Connor, *Applying the Law of Targeting to the Modern Battlefield* (n.p., 2016), accessed April 15, 2017, <https://www.defense.gov/Portals/1/Documents/pubs/Applying-the-Law-of-Targeting-to-the-Modern-Battlefield.pdf>.

⁵⁵ “To Retrieve Attack Helicopters from Russia, Syria Asks Iraq for Help, Documents Show,” The Syria Documents, November 29, 2012, accessed September 6, 2016, <https://www.propublica.org/article/docs-to-retrieve-attack-helicopters-from-russia-syria-asks-iraq-for-help>.

effect of limiting that Russian military capability.⁵⁶ The route that the UK government took to achieve that goal differed only based on the means. The UK decision represents an indirect approach, avoiding the logistics, cost, risk and repercussions associated with the alternative of traditional means.⁵⁷ The example of actions taken against the MV Alaed shows the value of lawfare. The delay in Russian attack helicopters arriving into Syria created favorable conditions on the ground for military forces operating in Iraq and Syria by temporarily preventing Russian attack helicopter operation from inside Syria.⁵⁸ Perhaps most valuably, the lawfare operation developed future diplomatic possibilities by providing time to engage with the government of Iraq.

Risks to Lawfare: The Information Operations Comparison

The tool of premortem brings a needed dissenting view to lawfare development. Contemplating lawfare failure facilitates better preparedness. The potential to achieve bloodless objectives and cost-free results should not overawe lawfare implementers. As lawfare becomes increasingly usable, lawfare planners should assess the longer-term impact of their operational lawfare actions. To fully understand the impact of lawfare on the US military, planners should not fixate on the opportunity but must also consider risk.

Lawfare does not solely present operational opportunities. Lawfare must be implemented. Looking beyond what lawfare might provide as an opportunity requires anticipating implementation problems. Engaging in lawfare and developing the capability will create dilemmas. In moving

⁵⁶ The Army Universal Task List contains Article 3.4.3 entitled “Deny Enemy Use of Airspace” and Article 3.4.1.2, “Detect Aerial Platforms.” Army Doctrine Reference Publication (ADRP) 1-03, *The Army Universal Task List* (Washington DC, 2015), 3-13.

⁵⁷ Kittrie, *Lawfare: Law as a Weapon of War*, 3.

⁵⁸ The Russian government did not simply give up with the revocation of the insurance, but attempted to airlift the helicopters into Syria which triggered US diplomatic action to convince Iraq to deny use of its airspace. “To Retrieve Attack Helicopters from Russia, Syria Asks Iraq for Help, Documents Show,” *The Syria Documents*, November 29, 2012, accessed September 6, 2016, <https://www.propublica.org/article/docs-to-retrieve-attack-helicopters-from-russia-syria-asks-iraq-for-help>.

forward with lawfare development, planners should anticipate these issues as they will likely become part of the lawfare development. Identifying points of friction in the history of information operations development is one way to attempt to anticipate obstacles and risks lawfare implementers will likely encounter.

What follows are obstacles and risks that those implementing lawfare are likely to encounter. Without looking ahead to challenges that could cause lawfare failure, there is no chance to navigate a course around them.⁵⁹ Obstacles and indicators are arranged beginning first with more easily anticipated practical problems. Each of the eight risks moves further into the future, each becoming progressively harder to anticipate.

Risk 1: Integration with Other Warfighting Functions

Lawfare is useless without integration with existing capabilities.⁶⁰ Lawfare will need action from the intelligence and protection warfighting functions. One impediment to lawfare operationalization is the difficulty of integrating it into existing military capabilities. Because of the expertise needed to use it effectively, and particularly because of the Army's preference for kinetic action, lawfare integration into the Army will be likely challenging. Other services are likely better fits.⁶¹ The problems of integration and the difficulty of assessing the effectiveness of the operations

⁵⁹ Tyler Tervooren, "The Pre-Mortem: A Simple Technique to Save Any Project from Failure," *Riskology*, last modified 2017, accessed March 12, 2017, <https://www.riskology.co/pre-mortem-technique/>.

⁶⁰ This monograph uses Dunlap's term, "operationalization," roughly meaning "making lawfare usable and integrating with existing capabilities." Charles J. Dunlap, "Lawfare: A Decisive Element of 21st Century Conflicts?," *Joint Force Quarterly*, no. 54 (2009): 37, accessed August 15, 2016, <http://www.dtic.mil/dtic/tr/fulltext/u2/a515192.pdf>.

⁶¹ US Air Force Doctrine focuses on "mediums" rather than platforms, suggesting that the Air Force could more readily integrate lawfare as a stand-off weapon. "Doctrine is about effects, not platforms. Thus, Air Force doctrine does not explicitly tie specific weapon systems to specific tasks or effects. Focusing on using a medium is a vital first step to integration of efforts. 'Ownership' arguments eventually lead to suboptimal (and usually at best tactical) application of efforts at the expense of the larger, total effort." Air Force Doctrine Document 1, *Organization and Command* (Washington, DC, Government Printing Office, 2011), 5.

are connected. The Army struggled with how to integrate information operations into its military operations and evaluate their effectiveness.

Recalling Lebowitz's proposed counter-actions to al-Qaeda lawfare efforts is one way to demonstrate how effective lawfare would require inputs from other military functions.⁶² Effectively executing a counter-lawfare effort would require coordinated actions. Countering operatives preparing to overload the legal and detention systems with torture claims requires not only legal action but intelligence. Developing a lawfare defense would require generating information requirements to collect intelligence on the enemy's efforts. Collection assets would have to be assigned to monitor and gather these demands. This reality means that counter-lawfare cannot and must not be waged solely by legal experts, but include the coordination and synchronization across multiple warfighting functions. One consequence of lawfare preparedness is that overtasked collection assets and busy intelligence analysts would gather information for a lawfare operation they likely do not completely understand.

Lawfare will likely face the same challenges information operations experienced integrating with other capabilities and producing unified action. These challenges are costs that must be paid to realize any lawfare opportunities. Information operations experts also have pointed to four contemporary challenges of information operations; the "traditional kinetic focus of the military, resource constraints, and difficulty integrating with other operations, and higher level US government information campaigns."⁶³ Unless these obstacles can be overcome, lawfare's value to the military will be minimal.

⁶² Lebowitz's recommendations in that case were to better prepare the force to respond to torture claims of detainees. Implementing these ideas requires action by other warfighting functions such as intelligence and public affairs. Michael J Lebowitz, "The Value Of Claiming Torture: An Analysis Of Al-Qaeda's Tactical Lawfare", *Case Western Reserve Journal of International Law* 43, no. 1 (2010): 356-392, accessed August 15, 2016, <http://scholarlycommons.law.case.edu/jil/vol43/iss1/22>.

⁶³ Paul, *Information Operations - Doctrine and Practice: A Reference Handbook*, 68.

Risk 2: Problems of Assessment

A challenge with military information support operations was and is assessing effectiveness. During Vietnam, in addition to pamphlets and loudspeakers, information campaigns attempted to project psychological (PSYOP) messages on buildings and mountains, and publicized astrology foretelling good news for the Allies in the coming year.⁶⁴ These were all experiments without feedback. Without objective feedback to determine whether these specific lines of effort had the desired effect, the efforts tended to become increasingly bizarre caused by “lack of signs of tangible success of the PSYOP program.”⁶⁵ Lawfare should be aware that without information and standards to measure the effectiveness of effort, it will be difficult to learn from experimentation. Lawfare policymakers should implement lawfare with means of assessing effectiveness.

Contemporary studies have concluded that “current information operations doctrine has provided little guidance on how to assess effectiveness, so assessments have usually been associated with battle-damage assessment.”⁶⁶ Because of the historical and doctrinal lack of attention to assessment, information officers conduct assessment ad-hoc on a case-by-case basis.

Information needed for assessment can only come from observing the enemy. This fact requires collection by the intelligence function. One information officer identifies a need to coordinate between the intelligence and information operations cell, as the information necessary to refine the targeted theme or message can only come from information collected on the enemy.⁶⁷

⁶⁴ Stanley Sandler, “*Cease Resistance: It’s Good For You!*”: A History of U.S. Army Combat Psychological Operations, 2nd edition ed. (n.p.: US Army Special Operations Command. Directorate of History and Museums, 1999), 293.

⁶⁵ Ibid.

⁶⁶ Munoz means that post-strike battle damage assessments are of limited value in assessing non-kinetic military actions. Arturo Munoz, *U.S. Military Information Operations in Afghanistan: Effectiveness of Psychological Operations 2001-2010* (Santa Monica, CA: Natl Book Network, 2012), 132.

⁶⁷ Munoz, *U.S. Military Information Operations in Afghanistan: Effectiveness of Psychological Operations 2001-2010*, 132.

The collection of information requirement, in turn, creates a deeper problem as intelligence operators and tactical units become responsible for collecting the information that will facilitate an information campaign. A consequence is that intelligence professionals must be proficient in information campaigns.

Lawfare will likely require similar intelligence support and integration with staffs to be effective. Similarly, “interviews with PSYOP advisors suggest that the unit intelligence cell could be a great resource to use in developing Measures of Effectiveness and developing a collection plan to determine how a particular platform affected the target audience.”⁶⁸ Measuring effectiveness is then related to other capabilities. The changes required to these functions to implement lawfare effectively must be considered by lawfare advocates. Lawfare should expect issues like those confronted by information operations in the development of assessment and lawfare targets.

Risk 3: Structure and Ethics

Lawfare structure within the military must compromise between delivering unity of effort and undermining legitimacy.⁶⁹ The way that the lawfare capability is structured within the US military will influence not only its effectiveness, but ethical limitations and legitimacy. If lawfare follows the pattern of information operations, the drive to achieve maximum results from lawfare will encourage centralizing all lawfare capabilities. Without ethical limitations, centralizing efforts to aid coordination could undermine the ability to conduct lawfare. Therefore, the military must accept a level of inefficiency to protect against lawfare overreach.

⁶⁸ Munoz, *U.S. Military Information Operations in Afghanistan: Effectiveness of Psychological Operations 2001-2010*, 132.

⁶⁹ Legitimacy in this context is Max Weber’s definition, “the basis of every system of authority, and correspondingly of every kind of willingness to obey, is a belief, a belief by virtue of which persons exercising authority are lent prestige.” Max Weber, *The Theory of Social and Economic Organization*, ed. Talcott Parsons (New York: Free Press, 1964), 382.

Information operations have struggled with the same tension between unity of effort and legitimacy. In Vietnam, the importance of opinion and influence grew gradually over time. Over time the importance of opinion eclipsed even the traditional military actions on the ground in Vietnam. The US acted to produce one unifying message in the most efficient and effective way: by unifying all efforts in one command.

In part because of the many and varied target audiences in Vietnam, greater Indo-China, and the US, Lyndon Johnson made the decision to integrate all information and PSYOP activities under the Joint United States Public Affairs Office (JUSPAO). Rather than the traditional view of the information operations serving the military, the JUSPAO Chief stated: “it must be recognized that propaganda and psychological warfare are the primary weapons system of the era and that the function of military operations is, in essence, limited to supporting them.”⁷⁰ The target audience in this war could not simply be “the enemy,” but must include the Viet Cong guerrilla in the South, the North Vietnamese regulars, the civilian population of South Vietnam, and the civilians of North Vietnam. Because psychological operations had traditionally been disunited, in this conflict where messaging was paramount, there was considerable pressure to unite the messaging, eliminate conflicting action, and achieve the greatest effect.

Terms had to change to reflect this wider unified effort, as it would be inappropriate to call public affairs information consumed by a variety of audiences “war.” The term “Psychological Warfare” was replaced by that of “Psychological Operations” (PSYOP) in the January 1962 FM 33-5, *Psychological Operations*.⁷¹

⁷⁰ Sandler, *“Cease Resistance: It’s Good For You!”: A History of U.S. Army Combat Psychological Operations*, 266.

⁷¹ Sandler, *“Cease Resistance: It’s Good For You!”: A History of U.S. Army Combat Psychological Operations*, 261.

The change reflected a growing awareness that in “brush fire war,” “unconventional war,” “guerilla war,” etc. or “Wars of National Liberation” (as the communists and their sympathizers termed them) psychological campaigns would have to be directed not only at the armed enemy but as much toward the civilian population, and here the term “warfare” would be inappropriate.⁷²

Reacting to this environment of diverse actors, the US government consolidated information control and widened the scope of its information influence.

Lawfare advocates should be aware of the tendency to focus on confined problems without anticipating longer-term potential issues. Placing public affairs with persuasion campaigns resulted in greater unity of action, but it was not cost-free. Just as the structure that developed in Vietnam “blurred distinction between information and persuasion in order to achieve immediate and demonstrable results,” so too could lawfare efforts and structure blur any distinction between law and lawfare.⁷³

The importance of the widening information campaign in Vietnam eroded the need to maintain separate realms of public affairs and information operations. JUSPAO focused on managing the immediate situation without examining the effect of blurring the distinction between information and influence. Kodosky writes of the Vietnam War period that the perception of US officials was that the biggest problem in Vietnam was due to the unfavorable coverage by American reporters of South Vietnamese (RVN) forces.⁷⁴ The desire to manage this situation and the

⁷² Field Manual (FM) 3, *Psychological Operations* (Washington, DC: Government Printing Office, 1962), 3-5 in Stanley Sandler, “*Cease Resistance: It’s Good For You!*”: A History of U.S. Army Combat Psychological Operations, 2nd edition ed. (n.p.: US Army Special Operations Command. Directorate of History and Museums, 1999), 261.

⁷³ Robert J. Kodosky, *Psychological Operations American Style: The Joint United States Public Affairs Office, Vietnam And Beyond* (New York, NY: Lexington Books, 2007), xviii.

⁷⁴ Kodosky, *Psychological Operations American Style: The Joint United States Public Affairs Office, Vietnam and Beyond*, 123.

deepening problems with the RVN necessitated centralization and unification of the psychological operations program.

By the spring of 1965, American officials had come to the conclusion that the war on the battlefield constituted only one part of the conflict in Vietnam. The other part, they deemed, involved the perceptions of reporters who suggested that the hostilities stemmed more from southern discontent than from external communist aggression.⁷⁵

In other words, the negative portrayal of the war effort was part of the war itself. It was this confluence of facts that led President Johnson to create a single umbrella organization to carry out American psychological operations.⁷⁶

Two main organizations at this period were the United States Information Agency (USIA) and the Joint United States Public Affairs Office. The missions of the two agencies differed on paper, one directed to provide information to the American public and the other to deflate the will of the enemy. However, on 14 May 1965 United States Embassy Instruction 186 united the United States Information Service, Military Assistance Command Vietnam and the United States Agency for International Development under JUSPAO.⁷⁷ The missions in practice were not separate because “eager for results, American officials re-conceptualized PSYOP in Vietnam to consist of ‘all means of communication.’”⁷⁸

⁷⁵ Kodosky, *Psychological Operations American Style: The Joint United States Public Affairs Office, Vietnam and Beyond*, 123.

⁷⁶ Ibid.

⁷⁷ The United States Information Service was a component of the United States Information Agency. Michael Barger, “Psychological Operations Supporting Counterinsurgency: 4th PSYOP Group in Vietnam” (MMAS thesis, US Army Command and General Staff College, 2007), 16, accessed April 14, 2017, <http://cgsc.cdmhost.com/utis/getdownloaditem/collection/p4013coll2/id/1065/filename/1066.pdf/mapsto/pdf/type/singleitem>.

⁷⁸ Kodosky, *Psychological Operations American Style: The Joint United States Public Affairs Office, Vietnam and Beyond*, 206.

In Vietnam, the United States confronted the contradictions it had set up by failing to delineate and limit its influencing activities. Psychological operations employed in Vietnam were intended to “win the hearts and minds” of the Vietnamese and populations of Southeast Asia. Kodosky writes that, in Vietnam, “any advantages that officials hoped to gain in the ‘war for hearts and minds’ by using these agencies clearly became eclipsed by the costs they incurred by providing critics of the American effort with legitimate questions concerning the United States credibility.”⁷⁹ Because the two efforts were intertwined, the concepts of PSYWAR and information became difficult to distinguish. The USIA Director Barry Zorthian questioned “whether there existed in Vietnam any ‘difference between information and psychological warfare’ and wondered if even ‘such a distinction is valid outside of the classroom.’”⁸⁰

Combining Public Affairs and psychological operational objectives into one agency in the Vietnam War decreased the ability of both public affairs and psychological operations to achieve their objectives. Without distinguishing persuasion and information, unification under JUSPAO gradually eroded US legitimacy and made information operations less effective. Lawfare parallels information operations by making law itself part of the battlefield. Lawfare structure within the military must balance between delivering unity of effort and the potential to undermine legitimacy. Centralizing lawfare capability could make it more effective and integrated, however it could also have the negative effect of decreasing the legitimacy of the US legal system. Like information operations, the drive to achieve maximum results from lawfare might counsel uniting all lawfare capabilities in one organization to deliver maximum effectiveness. This could prove to be short-sighted.

⁷⁹ Kodosky, *Psychological Operations American Style: The Joint United States Public Affairs Office, Vietnam and Beyond*, 15.

⁸⁰ Ibid., 5.

Without ethical limitations, which impose an artificial limitation on the employment of the lawfare capability, US legitimacy could be adversely affected. Lawfare advocates should therefore not focus solely on operational opportunities, but must consider longer-term consequences of operational lawfare actions. Without the example of information operations it is difficult to visualize lawfare detractors' fears.

Risk 4: Lawfare's Effects on Other Institutions

Lawfare advocates should consider not only potential changes and challenges to the military's ability to provide for the defense of the United States, but should also consider lawfare's effects on related American institutions. The lawfare opportunity to reduce servicemember exposure and reduce cost in current operations comes with corresponding longer-term risk. In the case of information operations, the desire for effective information campaigns affected communication and social research. Psychological operations funded and influenced academic research out of a military desire to conduct, inform, and influence operations as effectively as possible. Lawfare operationalization would likely affect academia in similar ways. Focusing too narrowly on operation opportunities will likely lead to a failure to anticipate governmental changes resulting from the use of lawfare.

During the cold war, politicians believed that a strong psychological operation would achieve the same results of kinetic action, limiting the numbers of deployed troops. Lawfare and information tools become more attractive options in resource-constrained environments. Policy makers and lawfare planners should consider the broader results of lawfare efforts. To effectively use lawfare in operations, the military will need legal expertise to develop lawfare techniques and mechanisms.

Tracing the development of propaganda and psychological operations during the Cold War, Simpson notes that "the United States often adopted propaganda and psychological operations as one substitute for US soldiers abroad as America demobilized much of its wartime army after

1945.”⁸¹ From Simpson’s discussion it is clear that the increase in expenditure in information operations activities after World War II was tied to a political desire to limit numbers of troops abroad and to a larger demobilization taking place within the military after the Japanese surrender in 1945.

Christopher Simpson attributes the close connection between information warfare and mass communication studies to

a relatively rational alternative to the extraordinary brutality and expense of conventional war. Persuasive mass communication can improve military operations *without increasing casualties*, its advocates contend, especially when encouraging a cornered enemy to surrender rather than fight to the death. Similarly, by supporting the morale and improving the command and control over their forces, those who can exploit these techniques *reap clear military advantages*.⁸² (emphasis added)

Harnessing the social research institutions to develop the capability further, and increasing coordination between academics in the mass communications field and government were economy of force operations.⁸³ With the need to limit casualties and deployments, the logic of psychological warfare between 1945 and 1960 was to apply mass communication theory and research to influence targeted audiences. All of this was done for goals achievable through conventional military forces, but at a lower cost as psychological warfare was “cheaper, more flexible, and sometimes less brutal than conventional war.”⁸⁴ This same sentiment drives many of the lawfare advocates arguments.

Because of the interaction between the military influence and academic information research, “communication studies in the United States have not typically been neutral, objective, or

⁸¹ Simpson, *Science of Coercion: Communication Research and Psychological Warfare, 1945-60*, 36.

⁸² *Ibid.*, 6.

⁸³ Simpson, *Science of Coercion: Communication Research and Psychological Warfare, 1945-60*, 116.

⁸⁴ *Ibid.*

even held at arm's length from the political and economic powers of the day.”⁸⁵ Military-funded social research influenced the subjects that received funding, and even influenced the entities producing the research.

The government's psychological warfare programs provided a very large fraction of the funding available for mass communications research throughout the late 1940s and the 1950s. Key research centers such as the Bureau of Applied Social Research and the Institute for Social Research owed their survival to contracts with the military, intelligence, and propaganda agencies, particularly during the crucial years of the early 1950s when communication studies emerged as a distinct discipline.⁸⁶

Lawfare advocates and implementers should understand this dynamic, and understand that the desire to use lawfare more efficiently will require information from legal studies. Unmitigated, lawfare implementation could cause ripple effects in legal studies. Lawfare development should anticipate dividing lines falling on support for military efforts, just as information operations scholars and institutions were incentivized “to readjust...to the political realities.”⁸⁷ The desire to conduct psychological operations required enlisting social sciences and changed research patterns in an industry. Lawfare might affect legal studies. Lawfare implementers should look for ways in which these types of unintended effects occur in other areas.

Risk 5: Unintended Consequences and Appearances

Lawfare advocates have not accounted for the effect of perception on lawfare operations. To effectively conduct lawfare, the military must create and train lawfare experts. The way that the military goes about obtaining lawfare expertise will influence public perception. Public perception will therefore have consequences for the development of lawfare

⁸⁵ Ibid.

⁸⁶ Ibid., 115.

⁸⁷ “The price tag for scholars who refused to support the cold war consensus could be quite high.” Simpson, *Science of Coercion: Communication Research and Psychological Warfare, 1945-60*, 103.

operationalization. Focusing too narrowly on operational opportunities of lawfare will neglect the effects of public perception.

The US military has many programs to develop professional expertise.⁸⁸ In addition to planning to bring these skills into the military, however, there must be awareness of potential news headlines. There is more to the problem than simply trying to conduct lawfare or information operations as productively as possible. The tendency will be for maximum effectiveness and capability when lawfare developers should also consider ways their actions could ricochet.

An example of a program that backfired based on perception came from psychological operations training in 2000. News stories report that “two leading US news channels have admitted that they allowed psychological operations officers from the military to work as placement interns at their headquarters during the Kosovo war.”⁸⁹ The reports acknowledged that the interns performed menial tasks, but the issue for the media was that “the fact that military propaganda experts were even present in newsrooms as reports from the Kosovo conflict were being broadcast ... triggered a storm of criticism and raised questions about the independence of these networks.”⁹⁰ This incident resulted in suggestions on the part of some that Army psychological operations influenced news networks, or that information operators had breached media independences.

⁸⁸ One example in the US Army is the Training with Industry program. “The Training with Industry (TWI) Program is a work-experience program to provide an extensive exposure to managerial techniques and industrial procedures within corporate America to competitively selected officers.” “AAC Training with Industry,” June 30, 2011, accessed January 31, 2017, <http://asc.army.mil/web/career-development/programs/aac-training-with-industry>.

⁸⁹ Julian Borger, “CNN Let Army Staff into Newsroom,” *The Guardian* (The Guardian), April 12, 2000, accessed April 14, 2017, <https://www.theguardian.com/world/2000/apr/12/julianborger>.

⁹⁰ Ibid.

Public perception will limit military options. The Army and US military attempted to install ethical limitations on information operations use, as McDonald notes “the American people, especially since Vietnam and Watergate, can become extremely angry with an administration that lies, especially about foreign policy or war.”⁹¹ It is because of the resulting public and moral implications that “the US military opposes altering images, at least when they are for the US public or military.”⁹² The US thus took measures to prevent Americans from being the target of influence operations. Thus, today the target of propaganda is the determining factor in the legality and permissibility of misinformation.⁹³ The outdated US Joint Publication 3-58 *Joint Doctrine for Military Deception* as well as the modern Joint Publication 3-13.4 *Military Deception* allow for deception only against hostile forces.⁹⁴

Despite these ethical limitations, the news room incident affected public perception of military information activities. Lawfare implementers must remain cognizant of appearance effects. News articles about the interns note that “the army's psychological operations are prohibited by law from manipulating the US media,”⁹⁵ but ethical limitations alone were unable to mitigate the appearance of impropriety. Lawfare implementers should, therefore, realize that popular perception will react to the way that the military creates lawfare expertise. In overcoming obstacles to project lawfare power, consequences and perception will remain factors.

⁹¹ Scot Macdonald, *Propaganda and Information Warfare In The Twenty-First Century: Altered Images And Deception Operations* (London: Taylor & Francis, 2006), 155.

⁹² Ibid.

⁹³ Ibid., 156

⁹⁴ Ibid.

⁹⁵ Julian Borger, “CNN Let Army Staff into Newsroom,” *The Guardian* (The Guardian), April 12, 2000, accessed April 14, 2017, <https://www.theguardian.com/world/2000/apr/12/julianborger>.

Risk 6: Multiple Lawfare Agencies

To effectively conduct operational lawfare, the military must recognize that there will be multiple institutions and government actors involved. There is significant risk to the military effectiveness of lawfare if lawfare implementers do not anticipate how the US government will approach lawfare outside the Army, the sister services, and the Department of Defense. Multiple agencies will necessitate delineating roles and responsibilities not only within the military for the services making up the US Armed Forces but throughout the government. The process of implementing and developing information-related capabilities had profound effects as the military efforts affected and were affected by other government agencies. Lawfare policy makers should consider how agencies will interact with and affect each other. Should lawfare advocates and implementers become fixated on operational opportunities, changes in agency structure of the US government would be uncoordinated.

The Office of Strategic Service (OSS) and Office of War Information (OWI) during and after World War II prepared the introduction of the Central Intelligence Agency's (CIA) role in information activities. US military information and psychological officers failed to anticipate both the introduction of new agencies using information-related capabilities and the way military information experiments set a precedent for those new agencies. Lawfare implementers should consider follow-on effects of their actions and anticipate political change akin to that which took place in the development of information operations.

The military's employment of lawfare will likely change as US agencies react and experiment with lawfare. If lawfare were to follow the pattern of information operations, the United States would first create a separate lawfare integration agency upon which the US military would model its lawfare capability. Any progress toward a proposed lawfare "command" would likely

affect military lawfare efforts.⁹⁶ Military lawfare advocates should anticipate any lessons gleaned from military experimentation would be incorporated within the Department of Defense and between other government agencies such as the Department of Treasury. One way in which this could occur can be seen in the period between 1941 and 1947 with the development of information agencies leading to the creation of the CIA and military information-related capabilities.

Due to its close association with the US military, the Office of Strategic Services became the model for the development of information operations in the United States. Shortly after the Japanese attacks on Pearl Harbor in December 1941, President Franklin Roosevelt authorized the creation of the Office of Wartime Information and the Office of Strategic Services. The OSS would operate differently from OWI as the OSS “steered clear of the war’s political issues and aligned itself closely with America’s military, a situation made easier by Roosevelt’s decision to put the OSS under the authority of the Joint Chiefs.”⁹⁷ The distinction between information produced by the more political OWI and the more directly US military-aligned OSS is most pronounced in the former’s use of “white” propaganda and the latter’s use of “black” propaganda.⁹⁸ OSS materials were designed to look as if they came from a resistance movement or the enemy itself, while OWI information was “overtly advertized as coming from the Allies.”⁹⁹ The OWI became disruptive to the State Department and was dissolved by Congress by the end of World War II.¹⁰⁰ Though the US

⁹⁶ See Joel P. Trachtman, "Integrating Lawfare And Warfare," *Boston College International and Comparative Law Review* 39, no. 2 (June 2016): 267-282, accessed September 8, 2016, <http://lawdigitalcommons.bc.edu/iclr/vol39/iss2/3>.

⁹⁷ Kodosky, *Psychological Operations American Style: The Joint United States Public Affairs Office, Vietnam and Beyond*, 67.

⁹⁸ “Black” propaganda is usually defined as “lies and deception” while “white” propaganda is selective use of the truth. Eugene Liptak and Richard Hook, *Office of Strategic Services, 1942-45: The World War II Origins of the CIA* (Oxford: Osprey Publishing, 2009), 9.

⁹⁹ Ibid.

¹⁰⁰ Kodosky, *Psychological Operations American Style: The Joint United States Public Affairs Office, Vietnam and Beyond*, 67.

disbanded the OSS in 1945, Army decision makers modeled future influence activities on the OSS.¹⁰¹

Within government and military formations, what has appeared to work in the past is often carried into the future. Later developments can often be traced back to earlier efforts. It is thus important for lawfare implementers to assess what patterns their actions set for the future. Experimental lawfare organizations could form the basis for other developments as OSS teams formed for special operations. The extent to which these changes are anticipated affects future success.

The process of building the control structure for information operations was gradual rather than sudden. Ultimately the various government experiments were consolidated in a permanent agency. In January 1946, the chief of intelligence of US Army Ground Forces became increasingly concerned with the perceived growing ideological threat of Marxism as the national military transitioned from the threat of Nazism and Japanese Imperialism to Russian Communism. Major General Wyman, speaking of this perceived problem, proposed a solution, saying

There must be some agency, some group either within or outside our national security forces, which can interest itself in these matters. There must be some weapon by which we can defend ourselves from the secret thing that is working at our vitals-this cancer of modern civilization. ... A new government policy is desperately needed to implement [this] psychological effort.... We must combat this creeping shadow which is in our midst.¹⁰²

William Donovan, the Director of the OSS, approached President Roosevelt about organizing America's post-war intelligence "detailing a plan for an unnamed service acting as a central

¹⁰¹ Hook and Liptak, *Office Of Strategic Services, 1942-45: The World War II Origins Of The CIA*, 5; Charles A Krohn and Christopher Paul, *Information Operations - Doctrine And Practice: A Reference Handbook* (Westport, CT: Praeger Security International, 2008), 11-12.

¹⁰² Simpson, *Science of Coercion: Communication Research and Psychological Warfare, 1945-60*, 35.

intelligence authority reporting directly to the President rather than to the JCS.”¹⁰³ It was not only the military that added to its capabilities to wage information warfare, and learned lessons through experimentation. The government as a larger entity added to its capacity and power outside of the military.

The Army and the US military as institutions gave birth to an increased military capacity to engage in information operations, and they assured the US government of the value and need for a central intelligence agency. In 1946 Congress passed the National Security Act creating the CIA and established the National Security Council.¹⁰⁴ In 1947 the first CIA Director Admiral Roscoe Hillenkoetter “asked the agency’s counsel for a formal legal opinion concerning whether the 1947 law had authorized ‘secret propaganda and paramilitary operations’ in peacetime.”¹⁰⁵

Rather than envision lawfare suddenly bursting into existence as a robust capability, advocates should envision a more gradual development of lawfare. Were lawfare to follow the pattern of information operations, the military lawfare capability would follow the creation of an outside agency. Other government institutions are likely to affect lawfare in the armed services just as armed service lawfare is prone to affect other government institutions. This process will likely cause adaptation in other government departments as they react to the lawfare effort. The challenge will be to keep the objectives that make lawfare beneficial in mind while reacting to unanticipated dilemmas. Lawfare implementers should consider how other governmental actions would affect the capability to better manage responsibilities and relationships as they developed in the information capability with the CIA and its precursors.

¹⁰³ Nelson MacPherson, *American Intelligence in War-Time London: The Story of the OSS* (London: Frank Cass Publishers, 2003), 218.

¹⁰⁴ Simpson, *Science of Coercion: Communication Research and Psychological Warfare, 1945-60*, 37.

¹⁰⁵ Ibid.

Conclusion

The lawfare debate is a disagreement over how to evaluate lawfare. Proponents are likely to see promising situations where accounting for the legal environment and leveraging law helps bring about a desired goal. Opponents are likely envisioning a longer-term hazard across a distant time horizon. The advocate approach is limited because it does not account for strategic and political reaction to operational lawfare actions. Those advocating for a lawfare approach should analyze potential failure using the key variable of time rather than rely on present opportunities. The proper response is to balance between how best to use lawfare in an operational context bounded in space and time while being aware of the possibility of long-term failure. Conducting a premortem and identifying failure risk can result in indicators that suggest possible failure.

Lawfare failure would be as envisioned by lawfare detractors. Over time, the system of order developed by high respect for legal principles becomes overwhelmed by cynicism and weakens rule of law. Therefore, lawfare advocates should consider how the lawfare detractor's vision could come to pass and guard against it. The case of information operations can assist in visualizing how the dangers of lawfare could develop.

Lawfare advocates have missed a key component in the development of lawfare: a historical example. It is challenging to anticipate the future without a comparison to a known entity. The process of information development provides a mechanism to identify potential points of failure in lawfare development. Lawfare may not necessarily develop along the pattern of information operations, but it is impossible to evaluate opportunity and risk without being able to make a relative comparison.

The danger of lawfare is inflating the opportunity without addressing the risk. Possible risks are potential long-term unintended consequences or side-effects to lawfare. Lawfare implementers can only anticipate risks by looking for possible future changes. Introducing the component of time allows the creation of a framework to evaluate opportunity and risk. In

examining the history of information operations, in operationalizing and weaponizing information, institutions other than the military changed in the interaction. The changes and adaptation occurred when the new capability began to cope with the practical challenges to effectively contribute to the war effort. Lawfare planners should consider the ways in which surrounding institutions might be required to change, and the consequences of these possible changes.

Focusing solely on operational lawfare concerns neglects the pattern that actions form, increasing the likelihood of unexpected changes. Information operations' relationship with mass communication research, reconciling the structure of information operations, and the relationship between strategic communication and operational communication agencies are examples of what can happen when long-term patterns are ignored.

In contrast, if the long-term is prioritized over operational concerns information operations and lawfare become less tactically and operationally usable. The Vietnam experience and aspects of the more recent War on Terror experience attest to the difficulty of conducting ad-hoc information campaigns without a structure of assessment and intelligence support.

Lawfare advocates have emphasized the operational implications of lawfare at the expense of the strategic while opponents have emphasized the strategic over the operational. An intelligent and appropriate US approach to lawfare can only occur by evenhandedly considering opportunity and risk. History indicates that the natural tendency is to overemphasize one aspect over the other. Future operational commanders and staff are likely to see their enemies use compliance-leverage disparity lawfare. The challenge for those staffs will likely be to address the current threat while considering the longer-term implications of their actions. Future lawfare planners can better prepare by considering how their predecessors confronted similar dilemmas in using information operations in military operations. Lawfare policy makers should be aware that not only will their decisions affect tactical actors, but that tactical actors also affect policy decisions.

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